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No. 78-743

In the

Supreme Court of the United States

OCTOBER TERM, 1978

ERNEST RIZZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Subject Index

Judgment and Opinion of the Court Below 2

Jurisdiction 2

Questions Presented 2

Statement of the Case 3

Statutes Involved 3

Reasons for Granting the Writ 4

1. The Wiretap Provisions Of The Omnibus Crime Control And Safe Streets Act of 1968 (18 U.S.C. §§2510-2520) Do Not Apply To The Activities Of A Private Investigator In Intercepting In The Marital Home, At The Instigation Or With The Participation And Consent Of One Spouse, Communications Between The Other Spouse And A Third Party 4

2. The Petitioner's Conviction On The Theory Of Aiding And Abetting Was Improper 8

3. The Forcible Seizure Of A Cassette From The Petitioner's Hand Was A Violation Of His Rights Pursuant To The Fourth Amendment 11

4. The Indictment Was Fatally Defective For Failing To Allege That Petitioner's Acts Were Willful 13

Conclusion 18

Appendix 1a

Published Opinion of Lower Court 1a

Unpublished Opinion of Lower Court 7a

Order Denying Rehearing 20a

PAGE

TABLE OF AUTHORITIES CITED

CASES

Anonymous v. Anonymous, 558 F.2d 677 (2d Cir. 1977) 6

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971) 12

Cupp v. Murphy, 412 U.S. 291, 93 S.Ct. 200 (1973) 12

Keiningham v. United States, 287 F.2d 126 (D.C. Cir. 1960) 12

Marron v. United States, 275 U.S. 192, 48 S.Ct. 74 (1927) 11, 12

Marteney v. United States, 218 F.2d 258, 261 (10th Cir. 1954) 17

Shuttlesworth v. City of Birmingham, Ala., 373 U.S. 262, 83 S.Ct. 1130 (1963) 10

Simpson v. Simpson, 490 F.2d 803 (5th Cir. 1974) 5, 8, 11

Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270 (1970) 10

United States v. Bailey, 277 F.2d 560 (7th Cir. 1960) 14

United States v. Denmon, 483 F.2d 1093 (8th Cir. 1973) 17

United States v. Jones, 542 F.2d 661 (6th Cir. 1976) 5, 6

United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1975) 14

United States v. Schrimsher, 493 F.2d 848 (5th Cir. 1974) 4, 6

STATUTES

Title 18, United States Code, Section 2 ..... 3, 8, 9

Title 18, United States Code, Section 2511 ..... 4, 13, 14

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on September 1, 1978, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding the petitioner guilty of violating Title 18, United States Code, Section 2511(1)(a). He was sentenced to the custody of the Attorney General of the United States for a period of two years.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on August 10, 1977, without opinion and is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the District Court was filed on September 1, 1978, No. 77-1841, and is not yet reported, but is set forth in the Appendix.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was filed on September 1, 1978, and a timely petition for rehearing was denied on October 6, 1978. The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Do the wiretap provisions of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§2510-2520) apply to the activities of a private investigator in intercepting in the marital home, at the instigation or with the participation and consent of one spouse, communications between the other spouse and a third party?
2. Was the petitioner properly convicted as an aider and abettor?
3. Was the forcible seizure of a cassette from the petitioner's hand violative of his rights pursuant to the Fourth Amendment?
4. Was the indictment fatally defective for failing to allege that petitioner's acts were willful?

STATEMENT OF THE CASE

The petitioner was initially charged in an eleven count indictment returned by the Grand Jury on November 24, 1975. On March 23, 1976, a superseding thirteen count indictment was filed charging him with various acts of intercepting wire and oral communications in violation of Title 18, United States Code, Section 2511(1)(a).

He was found guilty after a jury trial on all counts of the indictment, and on August 10, 1977, he was sentenced to the custody of the Attorney General for imprisonment for a term of two years on each count, to run concurrent.

The petitioner was a licensed private investigator who was hired by several spouses to investigate and obtain information against the other spouse relating to suspected marital infidelities for possible use in divorce cases. Information was obtained with the aid of wiretapping and electronic eavesdropping equipment to intercept conversations between spouses of the clients and third parties.

In most instances the interceptions or attempted interceptions occurred with the knowledge, consent and assistance of the client-spouse within the marital home where both spouses were residing at the time of the interceptions.

STATUTES INVOLVED

Title 18, United States Code, Section 2:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commissions, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Title 18, United States Code, Section 2511:

> "(1) Except as otherwise specifically provided in this chapter any person who —
>
> (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communications."

REASONS FOR GRANTING THE WRIT

1. The Wiretap Provisions Of The Omnibus Crime Control And Safe Streets Act Of 1968 (18 U.S.C. §§2510-2520) Do Not Apply To The Activities Of A Private Investigator In Intercepting In The Marital Home, At The Instigation Or With The Participation And Consent Of One Spouse, Communications Between The Other Spouse And A Third Party.

Research has failed to disclose any federal reviewing court cases involving the criminal prosecution of a private investigator for a violation of the federal wiretap statutes (18 U.S.C. §§2510-2520) where the interception has taken place in the marital home at the instigation or with the participation and consent of one spouse of communications between the other spouse and a third party.

Similarly, no reviewing court decisions have been found involving the prosecution of one spouse for intercepting the communications of the other spouse and a third party where the interception has taken place in the marital home.

The reported cases with factual situations somewhat similar to those present in the case at bar, however, are readily distinguishable.

In the case of *United States* v. *Schrimsher,* 493 F.2d 848 (5th Cir. 1974), the defendant's conviction for a violation of 18 U.S.C. §2511(1)(a) was affirmed. However, he

was not married to the victim of the wiretap nor was he residing on the same premises, and therefore, the Fifth Circuit concluded that his conduct was within the scope of the statute.

In *United States* v. *Jones,* 542 F.2d 661 (6th Cir. 1976), the defendant, although still legally married to the victim of the wiretap, was no longer residing in the marital home and was also under a restraining order issued by the divorce court preventing him from "coming about" his wife. Under such circumstances the court concluded that the "implied inter spousal exception to the wiretap statute" was not applicable to him.

However, research has disclosed two reviewing court cases which have recognized the "implied inter spousal exception to the wiretap statute."

In *Simpson* v. *Simpson,* 490 F.2d 803 (5th Cir. 1974), the Fifth Circuit held that the wire interception provisions of the Omnibus Crime Control and Safe Streets Acts of 1968 did not apply to the interception by a husband of his wife's conversations in the marital home. After reviewing the legislative history of the Act, the Court concluded:

> "Given this inconclusive legislative history, we think two other factors are important. First, it is clear that Congress did not intend to prohibit a person from intercepting a family member's telephone conversations by use of an extension phone in the family home — subsection (5)(a)(i) of section 2510 directly covers this point. If there is a convincing distinction between this clearly acceptable overhear and the overhear accomplished by appellee, we fail to see it. In fact, we think the (5)(a)(i) exemption is indicative of Congress's intention to abjure from deciding a very intimate question of familial rela-

tions, that of the extent of privacy family members may expect within the home vis-a-vis each other.

Second, we note that not only does Title III have the primary goal of controlling crime, but that it also prescribes criminal sanctions for its violators. That is, if appellant prevails here then appellee is subject to severe criminal penalties, assuming of course that the prosecution could meet the higher standards of proof required for criminal convictions. We thus are bound by the principle that criminal statutes must be strictly construed, to avoid ensnaring behavior that is not clearly proscribed. See Kordel v. United States, 1948, 335 U.S. 345, 349, 69 S.Ct. 106, 109, 93 L.Ed. 52, 56. We consider this basic due process principle to be of considerable importance in this case, in light of our own inability to determine from the statute and its legislative history whether one is prohibited from taping one's spouse's conversations within one's own home." 490 F.2d at page 809.

Also in the case of *Anonymous* v. *Anonymous,* 558 F.2d 677 (2nd Cir. 1977), the Second Circuit held that a wiretap involving a mere marital dispute did not rise to the level of criminal conduct proscribed by the federal wiretap statutes. In reaching its decision the Second Circuit distinguished the facts present in *Anonymous* from those present in *United States* v. *Jones,* 542 F.2d 661 (6th Cir. 1976) and *United States* v. *Schrimsher,* 493 F.2d 848 (5th Cir. 1974) and stated:

"The extension phone exemption was not applicable in the Sixth Circuit case, United States v. Jones, supra. In Jones, the defendant's wife had left the marital home and established her own, separate residence. The defendant entered his estranged wife's home and placed a recording device on her telephone. Through this means, the defendant intercepted not only the target conversations between his wife and her lover, but also all other incoming and outgoing calls. Similarly, in United States v. Schrimsher, 493 F.2d 848 (5th Cir. 1974), the defendant hid for five days under the house of his lover (who was also the mother of his child) and electronically intercepted and taped all of her telephone conversations. The defendants in Jones and Schrimsher thus invaded the privacy of innumerable persons, known and unknown. This invasion removed those two cases from the province of mere domestic conflicts, and the Sixth and Fifth Circuits correctly held that the federal wiretap statutes proscribed the respective defendants' alleged conduct.

The facts in the instant case, by contrast, present a purely domestic conflict — a dispute between a wife and her ex-husband over the custody of their children — a matter clearly to be handled by the state courts. We do not condone the husband's activity in this case, nor do we suggest that a plaintiff could never recover damages from his or her spouse under the federal wiretap statute. We merely hold that the facts of this case do not rise to the level of a violation of that statute." 558 F.2d at page 679.

The opinion of the court below in holding that "there is no implied derivative spousal immunity in favor of a private investigator who, in the words of the statute, 'willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire . . . communications' " is very confusing.

In affirming petitioner's conviction, the court below stated that "we need not choose between the interpretations given the statute (18 U.S.C. §2511) in *Simpson* and in *Jones.* We assume, without deciding, that *Simpson* was correctly decided and yet affirm Rizzo's conviction." See page 4a of published opinion.

On page 15a of its unpublished opinion the court below stated:

> "In our published opinion accompanying this order, we assume that §2511(1)(a) does not apply to spousal interceptions in the marital home but hold that even on that assumption third persons participating in the interceptions do not share the spouse's immunity."

By assuming that *Simpson* was correctly decided, the court below was acknowledging that one spouse is not prohibited from intercepting the other spouse's conversations with third parties within the marital home. In other words the court below was recognizing that there is an interspousal exception to the wiretap statute.

Under the rationale of the court below it appears that there would not have been a violation of the statute in question had the spouse conducted the wiretapping without the aid of a third party. It is very difficult to comprehend how a person's activities can be elevated to that of a crime merely because he is hired to assist in the performance of activities which if performed alone by the party hiring him would not be criminal.

2. The Petitioner's Conviction On The Theory Of Aiding And Abetting Was Improper.

Because of the court below's holding to the effect "that §2511(1)(a) does not apply to spousal interceptions in the marital home," certain of its other rulings on issues raised below also appear to be confusing and erroneous.

In the unpublished portion of the opinion of the court below, the Seventh Circuit attempts to justify its affirmance of the petitioner's conviction on the grounds that he was properly convicted as an aider and abettor pursuant to the provisions of 18 U.S.C. §2. However, since

the Seventh Circuit assumes that the activities of the spouse who employed the petitioner were not prohibited by 18 U.S.C. §2511(1)(a), this theory would be untenable.

18 U.S.C. §2 specifically provides that a person is punishable as a principal if he aids, abets, counsels, commands, induces or procures the commission of an offense against the United States. If the court below concluded that petitioner had aided, abetted, counseled, etc. the spouse who employed him, his conviction under this statute could not be sustained for the reason that the court also concluded that the activities of the spouse were not criminal. Thus petitioner was not aiding or abetting another person to commit an offense against the United States.

Notwithstanding the fact that it would be impossible for petitioner to be convicted as an aider and abettor the trial judge erroneously instructed the jury as follows:

> "Every person who willfully participates in the commission of a crime may be found guilty of that offense. A defendant need not personally perpetrate every act constituting the offense charged in order to be found guilty.
>
> Whoever aids, abets, counsels, commands, induces or procures the commission of a crime is punishable as a principal. In order to aid or abet the commission of a crime a person must associate himself with a criminal venture, participate in it and try to make it succeed."

In charging the jury relating to the elements of the charged crime, the trial court improperly instructed the jury as follows:

> "Three essential elements are required to be proved in order to establish the offense charged in each of the thirteen counts of this indictment — first, that

the defendant acted willfully; second, that the defendant intercepted, endeavored to intercept or *procured another person to intercept or endeavor to intercept a communication,* and, third, that the communication was a wire or an oral communication." (Emphasis Added)

In the court below petitioner challenged the foregoing instruction on the grounds that none of the counts of the indictment charged him with having "procured another person to intercept or endeavor to intercept a communication," and, therefore, this instruction permitted the jury to find him guilty of an offense not charged against him. The trial judge was in effect broadening the charge against the petitioner. This, of course, could properly be done only by the grand jury itself. See this Court's opinion in *Stirone* v. *United States,* 361 U.S. 212, 80 S.Ct. 270 (1970).

The court below erroneously sustained the giving of this instruction by stating (Page 16a of unpublished opinion):

". . . In fact, there was no error at all. Under 18 U.S.C. §2 one who procures the commission of an offense (par. (a)) or causes another to do an act which would be an offense if done directly by the party causing it (par. (b)) is punishable as a principal. See *United States* v. *Maselli,* 534 F.2d 1197, 1200 (6th Cir. 1976). It was unnecessary for the indictment to charge under §2 in order to bring that section into play; charging the substantive offense was sufficient."

In *Shuttlesworth* v. *City of Birmingham, Ala.,* 373 U.S. 262, 83 S.Ct. 1130 (1963), this Court held that there can be no conviction for aiding and abetting someone to do an innocent act. The cases are legion to the effect that in order to sustain a conviction on the theory that the

accused was an aider and abettor, it must first be established that an offense was committed and that the accused assisted in its commission.

Since the Seventh Circuit has in effect conceded that the spouse's conduct was not a criminal offense, the petitioner could not be convicted as having assisted in the commission of a crime against the United States.

The trial court also instructed the jury:

"You have heard some evidence regarding a lawyer advising the defendant that one spouse could legally wiretap his or her spouse's telephone conversations. Congress enacted the Federal Wiretapping Statute to protect the privacy of all persons conversing over the telephone and their privacy is shielded from invasion by third parties and spouses alike. For the purpose of the Federal Wiretap Law it makes no difference whether a wiretap is placed on a telephone by a spouse or private detective in the spouse's employ; the end result is the same — the privacy of the unconsenting parties to the intercepted conversation has been invaded."

This too would be an erroneous instruction in view of the Seventh Circuit's statement that it assumed the decision of *Simpson* to be correct.

3. The Forcible Seizure Of A Cassette From The Petitioner's Hand Was A Violation Of His Rights Pursuant To The Fourth Amendment.

The decision of the court below upholding the seizure of the cassette from the petitioner's hand is in conflict with this court's decision in *Marron* v. *United States,* 275 U.S. 192, 48 S.Ct. 74 (1972), wherein it was stated:

"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another.

> *As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*"
> 48 S.Ct. at page 76 (Emphasis Added)

The principles of *Marron* would also apply to the situation where an officer executing a search warrant seizes an article not on the premises described in the search warrant.

In *Keiningham* v. *United States,* 287 F.2d 126 (D.C. Cir. 1960), the court held:

> "We know of no clause in the warrant issued extending the authority granted therein in the event of unforeseen circumstances, and it is very well settled that search warrants must be strictly construed. *The authority to search is limited to the place described in the warrant and does not include additional or different places.*"
> (Emphasis Added) 287 F.2d at page 129.

In reaching the conclusion that the forcible seizure of the cassette from the defendant's person was lawful, the Court below relied on the case of *Cupp* v. *Murphy,* 412 U.S. 291, 93 S.Ct. 2000 (1973). However, in that case this Court sustained the forcible taking of fingernail samples from the accused on the grounds that there was probable cause for his arrest notwithstanding the fact that he was not formally arrested.

In the case at bar, however, there is no indication by the Court below that the agents had probable cause for the arrest of the petitioner at the time the cassette was forcibly taken from him. Actually, the petitioner was not arrested until sometime in November, 1975, when an indictment was returned — over a year after the seizure.

The case of *Coolidge* v. *New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022 (1971), also cited by the Court below in

support of its decision, refers to several examples of the "plain view" exception. The first example is the situation where the police have a warrant to search a given area for specified objects, and during the course of the search come across some other article of incriminating character. The second is the situation where the police inadvertently come across evidence while in "hot pursuit" of a fleeing suspect. Another is when an object comes into view during a search incident to a valid arrest. The last situation is where a police officer is not searching for evidence against an accused, but nonetheless inadvertently comes across an incriminating object.

None of the foregoing situations is analogous to the factual situation present in the case at bar. The warrant here authorized the agents to search the petitioner's car; however, he was not present in the car at the time of the search. The agents here were not in "hot pursuit" of a fleeing suspect. Since the petitioner was not arrested, the seizure of the cassette cannot be justified as being incident to a valid arrest. The final exception referred to above is also not present in the case at bar since the agents were searching for evidence against the petitioner.

Therefore, since the search warrant in the case at bar was for a search of the petitioner's car, and he was not in the car at the time of the search, the seizure of the cassette from his person was improper and violative of his rights pursuant to the Fourth Amendment of the United States Constitution.

4. The Indictment Was Fatally Defective For Failing To Allege That Petitioner's Acts Were Willful.

In all thirteen counts of the indictment the petitioner was charged with a violation of Title 18, United States Code, Section 2511(1)(a).

The pertinent portion of Title 18, Section 2511(1)(a), United States Code provides that "(1) Except as otherwise specifically provided in this chapter any person who — (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication; . . ."

However, the indictment in this cause and each count thereof charged that the petitioner "knowingly and unlawfully did endeavor to intercept and did intercept wire communications. . . ." Nowhere in any counts of the indictment is there an allegation that he acted "willfully" as required by the statute.

Although he did not file a pre-trial motion to dismiss the indictment, this defect in the indictment was unsuccessfully raised by him during the course of the trial at the close of the government's case in his Motion for Directed Verdict of Acquittal at the Close of the Government's Case.

It is well-settled law that a motion to dismiss an indictment for failure to state an offense may be made at any time including on appeal for the first time. See *United States* v. *Bailey,* 277 F.2d 560 (7th Cir. 1960).

In *United States* v. *Mekjian,* 505 F.2d 1320 (5th Cir. 1975) the conviction of the defendant for various violations of Title 18, Section 1001, United States Code, was reversed for failure of the indictment to charge that the offense was committed "willfully". In holding that "willfulness" was an essential element of a Section 1001 charge and must be alleged in *haec verba* or by words of similar import, the court stated on page 1324:

> "This court has recognized that an indictment must set forth all essential elements of an offense in order to apprise a defendant of the charge he must meet and to protect against double jeopardy. United States v. Fischetti, 5 Cir. 1971, 450 F.2d 34, 39, cert. denied, 405 U.S. 1016, 92 S.Ct. 1290, 31 L.Ed.2d 478. If this requirement were to be undermined, a defendant would have no assurance that a grand jury would have returned an indictment against him. United States v. Denmon, 8 Cir. 1973, 483 F.2d 1093, 1095.
>
> The initial question for consideration, then, is whether 'willfully' is an essential element of a Sec. 1001 offense. We answer this question in the affirmative. The statute uses both 'willfully' and 'knowingly' in defining the offense. Each encompasses a different element of the requisite mens rea, requiring differing proof. 'Knowingly' under Sec. 1001 requires proof that a defendant acted 'with knowledge.' See McBride v. United States, 5 Cir. 1955, 225 F.2d 249. 'Willfully' under Sec. 1001 requires proof that a defendant acted 'deliberately,' or 'deliberately and with knowledge.' Id. at 253-255; see United States v. Parten, 5 Cir. 1972, 462 F.2d 430, 432-433. Each must be proved beyond a reasonable doubt, as the district court recognized by so instructing the jury. See 225 F.2d at 253; Walker v. United States, 10 Cir. 1951, 192 F.2d 47, 49. It follows that, if a defendant is to be assured that he is being called to answer only to a grand jury indictment, is to be protected against double jeopardy, and is to be apprised of the charge he must meet in order to challenge effectively the government's proof, an allegation that the act alleged was done willfully must appear in the indictment.
>
> 'Willfulness' not being specifically alleged, the next question is whether the counts submitted to the jury contained words of similar import. We determine that they did not.
>
> The government contends that from the allegations of 'fraudulent statement,' 'as he then knew he had not performed such services,' 'knowingly,' and the facts as set forth in the several counts, a charge that the acts were done 'willfully' may be implied. We

reject this contention because, as noted above, to act 'willfully' means to act 'deliberately.' None of the allegations relied upon by the government import more than that the defendant acted 'with knowledge,' a separate and distinct element of a Sec. 1001 offense.

The similar import doctrine advances the policy, reflected in F.R.Cr.P.7(c), against fine-combing indictments for technical errors. But the words of similar import must be clear enough to insure that the indictment meets the purposes it is intended to serve. Such assurance is not present here.

Our decision in United States v. Fischetti, 5 Cir. 1971, 450 F.2d 34, cert. denied, 405 U.S. 1016, 92 S.Ct. 1290, 31 L.Ed.2d 478 controls this question. The indictment in that case charged the defendant with demanding, requesting and agreeing to receive and accept money from an employer engaged in an industry affecting interstate commerce in respect to his actions as an officer of a labor organization, in violation of Title 29, U.S.C., Sec. 186(b)(1). The statutory requirement that this be done 'willfully' was omitted from the indictment. Although the issue before the court was whether an amendment to the indictment by the trial court was permissible, this court found the change to be a substantial one in the nature of the offense charged. Judge Dyer stated:

> When the original indictment was returned in this case, the substantive counts did not allege that the appellants had 'willfully' violated the statute. Willfulness is specifically set out in the statute sub judice. It is thus an essential element of the offense and such statutory requirement cannot be ignored. (Citations omitted). It must be alleged and proved in order to obtain a conviction. Id. at 39.

In an indictment comparable to the present one, this court found that '[t]his essential element cannot be implied from a reasonable reading of the language of the indictment.' Id. Where an essential element

> is omitted, a trial court's instructions to the jury on the necessity of finding the missing element will not cure the error. See Denmon, supra 483 F.2d at 1097."

Similarly, in the case of *United States* v. *Denmon,* 483 F.2d 1093 (8th Cir. 1973), the court, in holding that the failure of the indictment to charge that the defendant acted "knowingly, unlawfully and willfully" was fatally defective, stated on page 1095 of its opinion:

> "However, the failure of the indictment to charge that the defendant acted knowingly, unlawfully, and willfully is fatally defective to the Government's prosecution of this indictment. Morisette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), holds that a criminal intent is an essential element of an offense under § 641. Despite this fact, the Government contends that the trial court's proper instruction requiring a finding of criminal intent has remedied the defect of the type present in this case is more than a matter of mere form or technical pleading and constitutes a substantive defect in the indictment. It is elementary in American jurisprudence that an indictment must set forth the essential elements of the offense charged, and if it does not, a conviction based thereon is fatally defective."
>
> See also *Marteney* v. *United States,* 218 F.2d 258, 261 (10th Cir. 1954).

Since the indictment in the case at bar did not allege all of the essential elements of the charged crimes, it was insufficient and the petitioner's motion in the trial court should have been granted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

No. 77-1841

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ERNEST RIZZO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75-Cr-721
JAMES B. PARSONS, *Chief Judge.*

Argued April 26, 1978—Decided September 1, 1978
Before SWYGERT, *Circuit Judge,* MILLER, *Associate Judge,** and TONE, *Circuit Judge.*

TONE, *Circuit Judge.* The first issue to which this opinion is addressed concerns the applicability of the wire interception provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, to the activities of a private investigator in gathering evidence of marital infiidelity. Specifically, we must decide whether these provisions apply to the investigator's interception in the marital home, at the instigation or with the participation of one spouse, of communications between the other spouse and a third party. The second issue is the lawfulness of a warrantless seizure of a tape cassette. We decide these issues in this opinion and others in an unpublished order and affirm the conviction under the criminal penalty provisions of the Act, 18 U.S.C. § 2511(1).

* The Honorable Jack R. Miller, Associate Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

I.

Defendant Ernest Rizzo, who is licensed as a private investigator in Illinois, was employed by several persons to investigate and gather evidence of suspected marital infidelities. The evidence establishes that in carrying out these engagements Rizzo, with the aid of wiretapping and electronic eavesdropping equipment, actually intercepted or endeavored to intercept conversations between spouses of the clients and third parties. In most instances the interception or attempted interception occurred with the knowledge and consent and sometimes the assistance of the client-spouse within the home where both spouses were residing at the time. Rizzo argues that § 2511(1) does not apply to interceptions by spouses within the marital home and that he shares in the spousal immunity.

Section 2511(1)(a) provides that, with exceptions concededly not applicable here,

> Any person who—
>
> > (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication; . . . shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

Under the definitional section of the Act, 18 U.S.C. § 2510, wire communications include telephone transmissions (§ 2510(1)), and "intercept" and "electronic, mechanical, or other device" are defined as follows:

> (4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.
>
> (5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than—
>
> > (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; . . .

The Fifth and Sixth Circuits have taken different views of the applicability of § 2511(1) to interceptions by the spouse within the marital home. *Simpson* v. *Simpson,* 490 F.2d 803 (5th Cir.), *cert. denied,* 419 U.S. 897 (1974); *United States* v. *Jones,* 542 F.2d 661 (6th Cir. 1976). *Simpson* was a civil action by the wife against the husband pursuant to the civil liability provision of the Act, 18 U.S.C. § 2520. The husband had attached a device for tapping and recording telephone conversations to telephone lines within the marital home and by that means had intercepted conversations between his wife and another man. The Fifth Circuit held that § 2511(1) did not apply under these circumstances. The court was careful, however, to limit its holding to interceptions made by the spouse. In discussing the legislative history of the statute, Judge Bell, speaking for the court, referred to the "minor portion" of the testimony at the lengthy legislative hearings that related to wiretapping in a domestic relations context and said,

> It should be noted that the concerns and information in these passages are primarily directed toward the involvement of private investigators in marital conflicts. Indeed, were appellant seeking to recover from a third party, we could not, on the basis of this legislative history, accept the defense that the interceptions were authorized by the husband. However, to our minds a third-party intrusion into the marital home, even if instigated by one spouse, is an offense against a spouse's privacy of a much greater magnitude than is personal surveillance by the other spouse. The latter, it seems to us, is consistent with whatever expectations of privacy spouses might have vis-a-vis each other within the marital home.

490 F.2d 808-809. (Footnotes omitted.)

In *Jones,* a criminal prosecution under § 2511(1), the defendant had used an electronic device to intercept tele-

phone calls between his estranged wife and another man. The installation of the device had occurred several months after the husband had moved out of the marital home and while he was under a restraining order issued by a state court prohibiting him from "coming about" his wife, although apparently, or so the court appeared to assume, while he was lawfully present on the premises as a babysitter for the children of the marriage. The court, speaking through Judge Celebrezze, first disagreed with the interpretation given the statute by the Fifth Circuit in *Simpson,* reviewing the legislative history as Judge Bell had done in *Simpson,* reaching the conclusion that Congress had not indicated any intention to exclude spouses from the coverage of § 2511, and holding that therefore they were included. Then, however, the court stated what appears to be an alternative ground for decision, *viz.*, that *Simpson* was distinguishable on its facts because Mr. and Mrs. Jones were not sharing a domicile at the time of the interception. 542 F.2d at 673.

In the case at bar, we need not choose between the interpretations given the statute in *Simpson* and in *Jones.* We assume, without deciding, that *Simpson* was correctly decided and yet affirm Rizzo's conviction. The court in *Simpson* carefully limited its decision to interceptions made by the spouse and indicated that it would have taken a different view of "a third-party intrusion into the marital home, even if instigated by one spouse." That is of course what occurred here. In each instance covered by a count o fthe indictment, Rizzo either installed the electronic device or procured the spouse to install the device, *i.e.,* gave her the device, told her to install it, and instructed her how to install it. His conduct was covered by the language of § 2511(1). Whatever may be said of the absence of any indication in the legislative history of an intention to make the statute applicable to the conduct of family members within the family household, *see Simpson,* 490 F.2d at 808 n.14, and *Anonymous* v. *Anonymous,* 558 F.2d 677 (2d Cir. 1977), there is nothing in that history to suggest that Congress did not intend to cover third parties, and in particular private investigators. In

fact, there are indications that, whatever Congress intended with respect to spouses, it recognized that it would be covering private investigators involved in marital disputes. *See Jones,* 542 F.2d at 669, including nn. 14-16. Accordingly, we conclude that there is no implied derivative spousal immunity in favor of a private investigator who, in the words of the statute, "willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire . . . communication."

II.

Upon obtaining a valid warrant to search Rizzo's car, FBI agents went to the vicinity of the apartment building in which one of Rizzo's clients resided, where the car was parked in the street. Shortly after they had searched the car Rizzo came out of the building carrying a tape cassette, which was visible to the FBI agents when they saw him. Although they did not arrest him, they forcibly took the cassette from him. He argues that this seizure violated the Fourth Amendment.

The search warrant is of no help to the government in justifying the seizure, because it authorized only a search of Rizzo's car and not his person. The question therefore is whether, independent of the search warrant, the agents were justified in seizing the cassette.

We conclude that the seizure was lawful. The agents did not know Rizzo would appear when they came to search his car, and the sight of him carrying the cassette was thus unanticipated. They had information that he was engaged in unlawful wiretapping activities in the building from which they saw him emerge. This provided a reasonable basis for believing that the cassette he was carrying was being or had been used in those activities. It was in plain view of the agents at a place where they had a right and a legitimate reason to be. *Cf. Coolidge* v. *New Hampshire,* 403 U.S. 443, 465-474 (1971). If they had deferred seizing it until they had obtained a warrant for its seizure, it would surely have been erased or secreted. There was thus an exigent circumstance. Making a formal arrest without

a warrant prior to seizing the cassette was not required. *Cf. Cupp* v. *Murphy,* 412 U.S. 291, 295-296 (1973).

The many other arguments made by Rizzo are dealt with in an unpublished order issued this day, because our rulings upon them do not meet the criteria for publication stated in Circuit Rule 35. For the reasons stated above and in that order, the judgment of conviction is affirmed.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

(ARGUED APRIL 26, 1978)
September 1, 1978

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. JACK R. MILLER, *Associate Judge*•
Hon. PHILIP W. TONE, *Circuit Judge*

No. 77-1841

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERNEST RIZZO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75-Cr-721
JAMES B. PARSONS, *Chief Judge.*

ORDER

This unpublished order supplements our signed opinion filed contemporaneously herewith, and addresses the issues that do not meet our criteria for publication established in Circuit Rule 35.

I.

The defendant attacks the sufficiency of the indictment, arguing that the grand jury's failure to charge that the

• The Honorable Jack R. Miller, Associate Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

defendant "willfully" violated § 2511 compels dismissal. We disagree.

The requirement that an indictment contain a clear delineation of the offense charged is to provide (1) notice adequate to permit preparation of a defense; and (2) protection against double jeopardy. *United States* v. *Willis,* 515 F.2d 798, 799-800 (7th Cir. 1975). These objectives are satisfied even though an indictment does not state *in haec verba* the requisite mental element but uses "words of similar import." *Finn* v. *United States,* 256 F.2d 304, 306 (4th Cir. 1958); *United States* v. *Salliey,* 360 F.2d 699, 701 (4th Cir. 1966). Here the indictment charged the defendant with having "knowingly and unlawfully" violated § 2511, thus using "words of similar import" to "willfully."

Moreover, because the defendant failed to move to dismiss on this ground until after he was put into jeopardy, we should construe the indictment "liberally in favor of sufficiency." *United States* v. *Willis, supra,* 515 F.2d at 798 (holding that an indictment "implicitly" charged the requisite willful mental state under 18 U.S.C. § 1709). Moreover, the defendant has not even attempted, either here or before the District Court to demonstrate prejudice.

II.

The defendant asserts numerous errors in evidentiary rulings, all of which are without merit.

A.

One of Rizzo's defenses was that, even if he committed the acts charged in the indictment, he lacked the requisite mental state of willfulness. He offered testimony, for example, that he had consulted with attorneys with respect to the legality of his acts. Accordingly, whether he knew what he was doing was unlawful was clearly an issue in the case.

Evidence of events which antedated the earliest act charged in the indictment was, therefore, clearly relevant

within the meaning of Rule 402, Fed. R. Evid., to negative Rizzo's good faith defense, particularly when combined with the evidence of the subsequent discussions between Rizzo and the FBI. This would include evidence of his allegedly prior wrongful acts (see also Rule 404(b), Fed. R. Evid.), discussions of the same between Rizzo and George Schultz, discussions of the same between Rizzo and the FBI agent, and discussions between Rizzo and FBI agents regarding the relationship between Rizzo and Kathy Schultz. Evidence of these matters was relevant to Rizzo's state of mind.

B.

Rizzo, who took the stand in his own behalf testified that in August, 1974, about a week after the FBI had taken wiretapping paraphernalia from him, he had visited the FBI headquarters and demanded return of the seized articles. He testified that at that time, in the course of a conversation with FBI Agent Hoyt, he had told Hoyt that he, Rizzo, had consulted with judges and attorneys, who had told him that his activities were lawful. This evidence was, of course, relevant on the issue of the defendant's state of mind at the time he made the statements.

FBI Agent Hoyt, testifying in rebuttal, acknowledged that he and Rizzo had talked, but denied that Rizzo ever told him about his belief in the lawfulness of his activities or that he had consulted with attorneys on the matter. Also, in response to a question put by Judge Parsons as to what Rizzo did say at the meeting, Hoyt responded:

> Mr. Rizzo, to my—I cannot recall specific comments he made at that time because he was under advice of counsel not to answer or comment on questions.

(Tr. 1999.)

Rizzo now attacks this evidence as contrary to the principles articulated in *United States* v. *Hale,* 422 U.S. 171 (1975) and *Doyle* v. *Ohio,* 426 U.S. 610 (1976). In both of these cases the defendants had remained silent after arrest, had given exculpatory testimony at trial, and were then impeached with their prior silence. The Court found this

impeachment improper in both cases, in *Hale* as a matter of federal law and in *Doyle* on constitutional grounds. The defendant's exercise of his right to remain silent after arrest (*Miranda* v. *Arizona,* 384 U.S. 436 (1966)), could not properly be the basis for an interference that his testimony at trial was false.

The cases are inapposite here, where the defendant's testimony was that he had made certain statements to the FBI agent. The government was not required to leave that testimony uncontradicted or to content itself with a mere denial. It was entitled to prove what Rizzo in fact had stated on the occasion in question, when that statement made it less likely than a mere denial would have that his testimony as to what he had said was true. Unlike *Hale* and *Doyle,* this is not a case in which the prosecution seeks to have interferences drawn from an exercise of the right to remain silent.

C.

Various other claims of reversible error in evidentiary rulings require only brief mention. No error resulted from the prosecution's questions to Mrs. Schultz as to her relationship with Rizzo, as bias is a proper basis of impeachment. Similarly proper was the question put to Rizzo's character witness about whether he knew of Rizzo's arrest and prosecution for auto theft. *Michelson* v. *United States,* 335 U.S. 469 (1948). Asking Rizzo whether he had ever physically threatened George Schultz was objectionable but not prejudicial in the context of this extraordinarily long trial in which the crucial issue was Rizzo's mental state.

D.

As Rizzo's appellate counsel acknowledged at oral argument, Rizzo's trial counsel offered only a general objection to each of the aforementioned evidentiary rulings. Yet in most, if not all, instances the evidence was admissible, albeit for a limited purpose. Under these circumstances, it is defense counsel's duty to request a limiting instruction, absent which a reviewing court may only reverse for plain

error. Compare Rule 105, Fed. R. Evid. with Rule 52(b), Fed. R. Crim. P. For the reasons indicated above, we find no plain error.

E.

Rizzo's final claim of error in evidentiary rulings relates to the trial judge's instruction in the jury during cross examination of Rizzo to disregard all of the testimony dealing with *Simpson* v. *Simpson,* 490 F.2d 803 (5th Cir.), *cert. denied,* 419 U.S. 897 (1974), discussed in the accompanying published opinion. Both Rizzo and an attorney whom he had consulted had referred to the *Simpson* case during their testimony. Inasmuch as the defendant is entitled to adduce, and have the jury consider, virtually any evidence relevant to a defense, no matter how tenuous it is, *see United States* v. *Chaney,* No. 77-2233 (7th Cir., June 22, 1978), this claim has superficial appeal, because Rizzo's understanding of *Simpson,* and what others might have advised Rizzo *Simpson* meant, was relevant to Rizzo's state of mind. What Rizzo fails to mention, however, is that it was Rizzo who had objected to testimony about the *Simpson* case and who acquiesced in this instruction, and it was the government that opposed that instruction. Rizzo, who invited the ruling, cannot now claim that it was error.

III.

The defendant disputes the sufficiency of the evidence on all counts except Counts 6, 9, and 10 on the ground that he was entitled to "derivative interspousal immunity." We have rejected the legal predicate to this argument in the accompanying published opinion. We now discuss his other sufficiency-of-the-evidence claims.

Count 6. Rizzo argues that Kathy Schultz, who must have been a party to any of the conversations intercepted, and who testified that she was the only person who used the telephone to which Count 6 related, consented to the wire interception, which would exonerate the defendant. *See* 28 U.S.C. § 2511(2)(d). The jury could rationally have rejected Kathy Schultz's testimony on consent, how-

ever, on the basis of her prior inconsistent statement to the FBI that she was unaware of any tap on her phone, evidence demonstrating possible pro-Rizzo bias on her part, and evidence that some of the tapping paraphernalia was not hidden on her property, but someone else's.

Counts 5, 9 and 10. The evidence on these three counts was circumstantial, but, viewed in a light most favorable to the government, *Glasser* v. *United States,* 315 U.S. 60, 80 (1942), was sufficient to support a conviction for each count.

Count 5 charged a wire interception at the La Reno house in April, 1974. Evidence was adduced to show that:

(a) Mrs. La Reno retained Rizzo to investigate Mr. La Reno;

(b) shortly thereafter Mr. La Reno discovered what appeared to him to be a tape recorder cord attached to his telephone line; and

(c) a cassette which had been in Rizzo's possession, but which was turned over to the FBI, contained conversations between Mr. La Reno and various third parties. (Mr. La Reno identified the conversations, and that he had made them from his phone.)

Counts 9 and 10 charged two separate wiretaps on the Raag residence in November, 1974. The evidence showed that:

(a) one Dr. Parl had hired Rizzo to investigate suspected marital indiscretion between Dr. Parl's husband and Mrs. Raag;

(b) to this end, Rizzo told Dr. Parl that he was tapping the Raag telephone;

(c) on two separate occasions in November, 1974, Illinois Bell Telephone repairmen discovered wiretapping devices attached to the Raag residence telephone; and

(d) Mrs. Raag identified Rizzo as the man who had followed her in his car.

IV.

The defendant raises the following points dealing with jury instructions.

A. *The Illinois Wiretapping Statute*

The trial judge, over timely objection by defense counsel, instructed the jury on the Illinois law of eavesdropping as follows:

> At all times relevant to this case it was unlawful under Illinois law for a person to use an eavesdropping device to hear or record all or any part of any conversation unless he has the consent of one party and he was requested to do so by the state's attorney. Furthermore, it was unlawful to use or divulge any information obtained through the use of any eavesdropping device except in a criminal proceeding.

Defense counsel contends that this instruction was superfluous, and prejudiced the defendant by wrongfully injecting into the case the issue of whether Rizzo violated Illinois law. We disagree.

The instruction is not superfluous. A principal theory of defense was, as we have said, that Rizzo lacked the required mental state under 18 U.S.C. § 2511(a)(1), and to support this theory, he adduced testimony to two attorneys whom he claimed to have consulted about the legality of his activities. One of them testified that he had advised Rizzo that his conduct was lawful under both state and federal law. The government had the right to dispute this evidence by putting the Illinois eavesdropping statute before the jury and arguing that in view of that statute it was unlikely that the attorney's advice was as he had testified. The instruction was, therefore, not superfluous.

The defendant also argues that the jury might have erroneously understood this instruction to state the elements of the offense for which the defendant was charged. The spillover argument is not persuasive in view of other instructions making it clear that the defendant was charged

with a federal violation the elements of which were clearly delineated.[1] In reviewing claims of error in jury instructions it is essential to consider the entire set of instructions, not view isolated instructions out of context, as Rizzo asks us to do here. *United States* v. *Park*, 421 U.S. 658, 674 (1975); *United States* v. *Rajewski*, 526 F.2d 149, 159 (7th Cir. 1975), *cert. denied*, 426 U.S. 908 (1976). We must assume that the jury directly followed the instructions given. *Opper* v. *United States*, 348 U.S. 84 (1954).

B. *The Interspousal Immunity Instruction*

Rizzo's second claim of error with respect to jury instructions is that the following instruction took from the jury his defense that he relied in good faith on the advice of counsel:

> You have heard some evidence regarding a lawyer advising the defendant that one spouse could legally wiretap his or her spouse's telephone conservations. Congress enacted the Federal Wiretapping Statute to protect the privacy of all persons conversing over the telephone and their privacy is shielded from invasion by third parties and spouses alike. For the purpose of the Federal Wiretap Law it makes no difference whether a wiretap is placed on a telephone by a spouse or private detective in the spouse's employ; the end result is the same—the privacy of the unconsenting parties to the intercepted conversation has been invaded.
>
> It is important to recognize that it is not just the privacy of the target spouse which has been violated but that of the other party to the conversation as well.

The purpose and effect of this instruction were not as Rizzo argues, but to advise the jury that Rizzo was not in

[1] Moreover, defense counsel never suggested that the instruction was confusing, but only that it was superfluous. Therefore, his argument concerning jury misunderstanding was waived, see Rule 30, Fed. R. Crim. P., absent a showing of plain error.

fact protected by the doctrine of interspousal immunity. (In our published opinion accompanying this order, we assume that § 2511(1)(a) does not apply to spousal interceptions in the marital home but hold that even on that assumption third persons participating in the interceptions do not share the spouse's immunity. The instruction states the law contrary to that assumption with respect to the spouse, but it correctly states the law with respect to Rizzo, so any error is harmless.) Both Rizzo and his attorneys, of course, had testified to their belief that the law was otherwise than stated by the court in the instruction. The jury might have taken their testimony as correctly stating the law, absent the clarifying instruction. The instructions, taken as a whole, gave the jury a correct statement of the law applicable to the case. A correct explanation of what was *not* the law was appropriate in view of Rizzo's and his counsel's testimony. Rizzo's requested advice-of-counsel instruction, preserving his good faith, or lack of culpable mental state, defense was given *in haec verba*. The instruction complained of, when read in the context of the overall charge and the evidence, was not erroneous.[2]

C. *The Elements Instruction*

1.

The trial court gave the following instruction, which the government tendered, on the elements of the offense:

> Three essential elements are required to be proved in order to establish the offense charged in each of the thirteen counts of this indictment—first, that the defendant acted willfully; second, that the defendant intercepted, endeavored to intercept *or procured another person to intercept or endeavor to intercept a communication;* and, third, that the communication was a wire or an oral communication.

[2] Rizzo's objection to the instruction was rather general. He never suggested to Judge Parsons, as he does to us now, that the instruction inadequately conveyed the correct principles to the jury.

Defendant complains of the underscored language, asserting that the indictment did not charge "procurement" and therefore his Fifth Amendment right to be tried only pursuant to a grand jury indictment was violated. Rizzo did not object to the instruction on this ground, so unless there was plain error his objection was waived. Compare Rule 30, Fed. R. Crim. P., with Rule 52(b), Fed. R. Crim. P., *see also United States* v. *Jackson,* No. 76-2074 (7th Cir., Jan. 6, 1978), Slip Op. at 8-11. In fact, there was no error at all. Under 18 U.S.C. § 2 one who procures the commission of an offense (par. (a)) or causes another to do an act which would be an offense if done directly by the party causing it (par. (b)) is punishable as a principal. *See United States* v. *Maselli,* 534 F.2d 1197, 1200 (6th Cir. 1976). It was unnecessary for the indictment to charge under § 2 in order to bring that section into play; charging the substantive offense was sufficient. *Levine* v. *United States,* 430 F.2d 641, 643 (7th Cir. 1970), *cert. denied,* 401 U.S. 949 (1971), and cases cited therein; *United States* v. *Maselli, supra,* 534 F.2d at 1200; *United States* v. *Matousek,* 483 F.2d 286, 288 (8th Cir. 1973). The instruction did no more than state the legally correct proposition that, if the defendant procured or caused an interception to be made that would have been unlawful if done directly by him, he was liable as a principle.

2.

The defendant next argues that the trial judge failed to instruct the jury that a necessary element of the offense under § 2511(a) was that there be a "federal nexus" to the acts charged. *See United States* v. *Burroughs,* 564 F.2d 1111 (4th Cir. 1977).

The government points out, however, that the defendant and the government stipulated at trial that the wires over which any intercepted telephonic communications were transmitted were those of a communications common carrier engaged in interstate commerce, thereby satisfying the federal nexus requirement as to all counts except Count 12. See 18 U.S.C. § 2510(1). The jury was instructed on

the definition of "wire communication," see *id.*, and was also instructed on the effect of a stipulation. The defendant objected to neither instruction. His objection to the elements instruction was not addressed to the failure to include the "federal nexus" element at that point in the instruction. Hence, the jury was, albeit in a roundabout way, appropriately instructed as to all necessary elements of Counts 1-11 and 13, and there was, therefore, no error.

With respect to Count 12, no stipulation was entered to the effect that any electronic transmission from the hidden eavesdropping device to the radio receiver traveled over an FM radio frequency, which would have satisfied the "federal nexus" requirement. See 18 U.S.C. § 2511(b)(ii). Moreover, the definition of oral communication given in the charge to the jury contained no "federal nexus" requirement. Hence, the jury was never instructed, directly or indirectly, on a necessary element of Count 12. Defendant failed, however, to object to the instruction on this ground, so the question is whether the error was one "affecting substantial rights," Rule 52(b), Fed. R. Crim. P. We hold it was not, because the only evidence of the interception charged in Count 12 was of one that utilized FM airwaves. That evidence was uncontradicted. Thus, as a matter of inexorable logic, if the jury found an interception they necessarily found one that had the requisite federal nexus. Hence, we cannot say that the error affected substantial rights.

V.

The remaining issue is whether the conviction under Count 6 should be reversed because evidence offered under that count was obtained by means of a warrant to search his car which was based on an affidavit Rizzo contends was insufficient. The affidavit was executed by FBI Agent Hoyt and recited specific hearsay information obtained from George Schultz as to Rizzo's wiretap on Kathy Schultz's phone and specific hearsay information from named youths in the neighborhood concerning Rizzo's wiretapping at the Reback apartment. Rizzo asserts that

the affidavit did meet either requirement of *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *see also Spinelli* v. *United States*, 393 U.S. 410 (1969), and *United States* v. *Harris*, 403 U.S. 573, 581-583, 585-586 (1971); but his specific argument concerns only the second prong of the *Aguilar* test, the credibility of the informer. (The first prong is plainly satisfied. The affidavit contains a sufficient showing of basis for Schultz's belief that the items to be seized were in a certain location.) The affidavit gives the names of all the hearsay informants, gives Schultz's address, and identifies him as a person who observed and heard evidence that his telephone had been tapped. It is clear from the affidavit that the declarants all observed Rizzo's conduct or heard admission by him under circumstances unrelated to any police investigation. None were paid informers, which is significant. *United States* v. *Wilson*, 479 F.2d 936, 940 (7th Cir. 1973). Although Schultz is now accused of spite by Rizzo, nothing in the affidavit would have indicated such a motivation to the magistrate, and there was nothing to suggest that the three other informants had any self interest to be served. Under these circumstances, the absence from the affidavit of specific recitals by the officer about how he knows of the reliability of the informants, which ordinarily could not be made with respect to a citizen informant, does not render the affidavit insufficient under the *Aguilar* doctrine. *See United States* v. *Spach*, 518 F.2d 866, 869 (7th Cir. 1975); *United States* v. *Unger*, 469 F.2d 1283, 1287 (7th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); *United States* v. *Bell*, 457 F.2d 1231, 1239 (5th Cir. 1972); *United States* v. *Burke*, 517 F.2d 377, 380-381 (2d Cir. 1975); *cf. United States* v. *Wilson*, *supra*, 479 F.2d at 940.

Here, as in *Unger*, the hearsay declarants were named and identified; how they obtained the information is stated; Schultz's detailed description of the car and its interior, including the electronic eavesdropping equipment, shows his familiarity with the place and objects of the contemplated search; and nothing appears from the affidavit to indicate a desire on the part of any declarant to spite the defendant. This case is unlike *United States*

ex rel. Saiken v. *Bensinger*, 489 F.2d 865, 867 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974), in which the informant was named but not otherwise identified and the affidavit did not show "that the informant gained his knowledge by observation or some other reliable way."

We are able to say here, as this court, sitting in banc, said in *Wilson*;

> A serious charge, . . . when volunteered by an identified party in the circumstances before us, carries with it an indicia of reliability of the informant.

479 F.2d at 940. Here, as in *Wilson*,

> That reliability was reinforced by the "internal content of the call which 'intrinsically proves the truth of the responsible citizen's word.'"

(Citing *United States* v. *Roman*, 451 F.2d 579, 581 (4th Cir. 1971), *cert. denied*, 405 U.S. 963 (1972).) The affidavit was, therefore, adequate.

For the reasons stated in the foregoing order and the published opinion of this date, the judgment of conviction is affirmed.

AFFIRMED.

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Octobert 6, 1978

Before

Hon. Luther M. Swygert, *Circuit Judge*
Hon. Jack R. Miller, *Associate Judge*•
Hon. Philip W. Tone, *Circuit Judge*

No. 77-1841

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERNEST RIZZO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75-Cr-721
James B. Parsons, *Chief Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

• The Honorable Jack R. Miller, Associate Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

Supreme Court, U. S.
FILED
FEB 6 1979
MICHAEL RODAK, JR., CLERK

No. 78-743

In the Supreme Court of the United States

OCTOBER TERM, 1978

ERNEST RIZZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-743

ERNEST RIZZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 583 F.2d 907. This opinion was supplemented with an unpublished opinion (Pet. App. 7a-19a).

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1978, and a petition for rehearing was denied on October 6, 1978 (Pet. App. 20a). The

petition for a writ of certiorari was filed on November 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 2511 provides in pertinent part:

> (1) Except as otherwise specifically provided in this chapter any person who—
>
> (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication; * * *
>
> shall be fined not more than $10,000 or imprisoned not more than five years, or both.

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2511(1)(a) prohibits a private investigator, acting at the behest of one spouse, from intercepting wire communications between the other spouse and a third party in the marital home.

2. Whether the seizure of a tape cassette petitioner was holding in plain view violated the Fourth Amendment.

3. Whether the indictment sufficiently alleged a violation of 18 U.S.C. 2511(1)(a).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 13 counts of unlawfully endeavoring to intercept and intercepting wire communications, in violation of 18 U.S.C. 2511(1)(a). He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-19a).

The evidence at trial established that petitioner, a licensed private investigator, was employed by several persons to investigate suspected marital infidelities. In carrying out these assignments petitioner used electronic equipment to intercept and record wire and oral communications between the suspected spouses and third parties (Pet. App. 2a). Ten of the 13 counts on which petitioner was convicted involved interceptions or attempted interceptions occurring with the knowledge, consent and (in some cases) assistance of the client-spouse within the home in which both spouses were then residing (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 4-8) that 18 U.S.C. 2511 is inapplicable to the interception of communications of one spouse in the marital home at the behest of the other spouse.[1]

As the court of appeals acknowledged (Pet. App. 3a), the lower courts have expressed divergent views on the question whether Section 2511(1)(a) applies to

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[1] Ten of the counts on which petitioner was convicted involved interceptions with the knowledge and consent of one spouse. Since petitioner was convicted on three other counts and he received identical concurrent sentences on each count, the Court need not consider this issue. *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

interceptions by one spouse of the other spouse's communications within the marital home. Compare *Simpson* v. *Simpson*, 490 F. 2d 803 (5th Cir.), cert. denied, 419 U.S. 897 (1974), with *United States* v. *Jones*, 542 F. 2d 661 (6th Cir. 1976). Nevertheless, the court below correctly concluded (Pet. App. 4a) that it need not decide whether the statute applies to that type of conduct, since the courts have uniformly agreed that Section 2511(1)(a) applies to the conduct involved here—interceptions by third parties, such as private investigators, even if the interception was instigated by one spouse. In *United States* v. *Jones*, *supra*, 542 F. 2d at 669, the Sixth Circuit concluded that Section 2511 "establishes a broad prohibition on all private electronic surveillance and that a principal area of congressional concern was electronic surveillance for the purposes of marital litigation" (footnote omitted). And in *Simpson* v. *Simpson*, *supra*, 490 F. 2d at 808-809, although the Fifth Circuit held that Section 2511 does not reach one spouse's interception of the other spouse's conversations within the marital home, it expressly recognized that the statute would have applied if the interception had been made by a private investigator acting at one spouse's behest: [2]

[2] *Simpson* was a civil action brought under 18 U.S.C. 2520. As applicable here, the civil and criminal liabilities are coextensive. "That is, if [the civil plaintiff] prevails * * * then [the defendant] is subject to severe criminal penalties, assuming of course that the prosecution could meet the higher standards of proof required for criminal convictions." *Simpson* v. *Simpson*, *supra*, 490 F.2d at 809. See also *United States* v. *Jones*, *supra*, 542 F.2d at 672 n. 23.

> * * * were appellant seeking to recover from a third party, we could not, on the basis of this legislative history, accept the defense that the interceptions were authorized by the husband. However, to our minds a third-party intrusion into the marital home, even if instigated by one spouse, is an offense against a spouse's privacy of a much greater magnitude than is personal surveillance by the other spouse.

In *White* v. *Weiss*, 535 F. 2d 1067 (1976), the Eighth Circuit followed *Simpson* and held that a private investigator's interception of conversations within the marital home with the consent of one spouse fell within the statute. Accord, *Remington* v. *Remington*, 393 F. Supp. 898 (E.D. Pa. 1975).[3]

In sum, there is no support for petitioner's argument that Section 2511(1)(a) does not apply to interceptions by a private investigator retained by one spouse to gather evidence in a marital dispute. The electronic interception of private conversations by a third party is precisely the type of conduct covered by the statute.[4]

[3] Petitioner relies (Pet. 6-7) on *Anonymous* v. *Anonymous*, 558 F.2d 677 (2d Cir. 1977), but that case concerned the interception by one spouse, over his own telephone, of conversations between the other spouse and their daughter. The court did not address the question whether an interception by a third party, such as a private investigator, would be within the reach of the statute.

[4] Petitioner also makes the related argument (Pet. 8-11) that he is entitled to a new trial because the district court erroneously instructed the jury that spouses as well as third parties are subject to the prohibitions of Section 2511. He argues that even assuming that this instruction was correct

2. Petitioner contends (Pet. 11-13) that the warrantless seizure of a tape cassette violated the Fourth Amendment.

The agents who seized the cassette had just completed a search of petitioner's car pursuant to a warrant that authorized the seizure of a tape recorder, tape cassettes, and a radio receiver as evidence of petitioner's unlawful interceptions of wire communications at a building on Bumblebee Drive (Tr. 315, 511-512). Shortly after the agents had completed the search of petitioner's car, which was parked on the street in front of the building on Bumblebee Drive, they saw petitioner emerge from the building carrying a tape cassette in his hand. The agents stopped petitioner, advised him of the warrant authorizing the search of his c[illegible], and seized the cassette (Tr. 316, 512-514, 765-771).

The court of appeals correctly concluded that the seizure of the cassette in these circumstances was lawful (Pet. App. 5a):

> [The agents] had information that [petitioner] was engaged in unlawful wiretapping activities in the building from which they saw him emerge. This provided a reasonable basis for believing that the cassette he was carrying was being or had been used in those activities. It was in plain view of the agents at a place where they had a right and a legitimate reason to be. *Cf. Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-474 (1971). If they had deferred seizing it until they had obtained a warrant for its seizure, it would surely have been erased or secreted. There was thus an exigent circumstance.

See *United States* v. *Sedillo*, 496 F.2d 151 (9th Cir.), cert. denied, 419 U.S. 947 (1974).[5]

3. Section 2511(1)(a) reaches any person who "willfully intercepts * * * any wire or oral communication." Petitioner contends (Pet. 13-17) that his indictment was fatally defective because it charged that he acted "knowingly and unlawfully" rather than "willfully."

Petitioner's contention was correctly rejected by the court of appeals and does not merit further review by this Court. An indictment is sufficient even though it does not state the requisite mental element of a crime in the precise words of the statute if it uses "*words of similar import.*" *Finn* v. *United States*, 256 F. 2d 304, 306 (4th Cir. 1958). Where,

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as regards third parties, it was prejudicial here because the jury was instructed that it could find petitioner guilty if he aided and abetted in a violation of Section 2511. This instruction, he contends, permitted the jury to find him guilty of assisting in what he argues would be an innocent act—one spouse's interceptions of the other spouse's communications within the marital home. Petitioner did not squarely raise this objection in either the trial court (see Tr. 1971-1973, 1980-1981, 2090) or the court of appeals, and accordingly it should not be a ground for review in this Court. See also Fed.R.Crim.P. 30, 52(b); *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n. 7 (1977).

[5] We do not suggest that the seizure was made pursuant to the warrant, which authorized a search of petitioner's automobile, not his person. We note that petitioner does not contend that the agents lacked probable cause to believe that the cassette was evidence of a crime or that the discovery of the cassette was not inadvertent. See *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 469-471.

as here, the defendant does not challenge its sufficiency prior to trial, the indictment should be upheld "unless it is so obviously defective as not to charge the offense by any reasonable construction." *United States* v. *Vanderberg*, 358 F. 2d 6, 10 (7th Cir. 1966). See *United States* v. *Pheaster*, 544 F. 2d 353, 361 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977); *United States* v. *Willis*, 515 F. 2d 798, 799-800 (7th Cir. 1975); *United States* v. *Santelises*, 476 F. 2d 787, 788 (2d Cir. 1973). Applying this standard, the court of appeals properly affirmed petitioner's convictions, because the allegation that petitioner "knowingly and unlawfully" violated Section 2511 was of sufficiently similar import to the term "willfully" to charge the offense (Pet. App. 7a-8a).[6] The indictment was clearly sufficient to protect petitioner against any future prosecution for the same offense, and he does not contend that the indictment failed to provide adequate notice to allow him to prepare his defense or prejudiced him in any other way.

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[6] Petitioner's reliance on *United States* v. *Denmon*, 483 F.2d 1093 (8th Cir. 1973), and *United States* v. *Mekjian*, 505 F.2d 1320 (5th Cir. 1975), is misplaced. Reversal was required in *Denmon* because the indictment charging an offense under 18 U.S.C. 641 failed to allege wrongful criminal intent in any fashion. See *Morissette* v. *United States*, 342 U.S. 246 (1952). *Mekjian* involved an assessment of the sufficiency of an indictment under 18 U.S.C. 1001, which—unlike Section 2511(1)(a)—uses both the term "knowingly" and the term "'wilfully". The court concluded that use of the term "knowingly" in the indictment did not obviate the need to include the term "willfully" as well. Moreover, a stricter standard of review was applicable in *Mekjian* because the defendant had attacked his indictment prior to trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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